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Supreme Court of the United States

October Term, 1976

No. 76-1650

ALBERT OHRALIK,
Appellant,
v.
OHIO STATE BAR ASSOCIATION,
Appellee.

On Appeal from the Supreme Court of Ohio

BRIEF FOR AMICUS CURIAE THE STATE BAR OF CALIFORNIA

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SUBJECT INDEX

	Pages
Interest of Amicus Curiae	1-10
A. Nature of Amicus Curiae	1-5
B. California's Rules Protect the Public From the Risks of Harm Inherent in Ambulance Chasing and Direct Solicitation by Attorneys for Their Own Purposes	5-10
Summary of Argument	11-16
Summary of Facts Revealed by the Record	17-51
A. Carol and Wanda Were Seriously Injured in an Automobile Accident	19-20
B. Ohralik Hardly Knew Carol and Wanda Prior to the Accident	20-23
C. Ohralik Solicited Carol	23-41
1. Ohralik First Telephoned Carol's Home	23-25
2. Ohralik Claims to Have Visited Carol's Parents Before Going to the Hospital	26-29

	Pages
Summary of Facts (Cont'd)	
3. Ohralik Visited Carol at the Hospital	30-37
4. Ohralik Then Went to the McClintock's Home	37-41
D. Ohralik Solicited Wanda at Her Home Immediately After Leaving the McClintocks	41-46
E. Wanda Subsequently Attempted to Discharge Ohralik	46-48
F. Carol Also Attempted to Discharge Ohralik	48-51
Argument - IN THE EVENT THIS COURT UNDERTAKES THE REQUISITE CONSTITUTIONAL BALANCING ITSELF, THE BALANCE SHOULD BE STRUCK IN FAVOR OF THE PROHIBITION AGAINST ATTORNEYS SOLICITING PROFESSIONAL EMPLOYMENT FOR THEIR OWN PURPOSES	52-75
A. Introduction	52-53
B. The California Prohibition Was Formulated by the California Bar and Approved by the California Supreme Court in Response to Strong Public Outrage at Solicitation	53-56

	Pages
Argument (Cont'd)	
C. The Prohibition Protects the Public from Situations Which, by Their Very Nature, Subject the Public to Risks of Invasions of Privacy, High-Pressure Salesmanship, Undue Influence, Overreaching, Misleading and Deceptive Practices, Divided Loyalties, Inadequate Representation and Other Breaches of Fuduciary Duties	56-70
D. The Ohralik Case Provides Yet Another Example of the Risks to Which the Public and the Administration of Justice Are Exposed when Attorneys Solicit Profes-ional Employment for Their Own Purposes	70-75
Conclusion	76
Appendices	
A. The Four Versions of the Facts in the Ohralik Case	1-8
B. Citations to Reported Decisions of the California Supreme Court Imposing Discipline on Attorneys for Direct Solicitation and Ambulance Chasing	1-3

CITATIONS

Cases:	Pages
Barton v. State Bar (1930) 209 Cal.677, 289 P. 818	5
Bates v. State Bar of Arizona (1977) ___ U.S. ___, 97 S.Ct. 2691	7-8, 9, 14
Best v. State Bar (1962) 57 Cal.2d 633, 21 Cal.Rptr. 589, 371 P.2d 325	60, 61, 64, 67
Bigelow v. Virginia (1975) 421 U.S. 809, 95 S.Ct. 2222	14
Breard v. City of Alexandria (1951) 341 U.S. 622, 71 S.Ct. 920	76
Brotsky v. State Bar (1962) 57 Cal.2d 287, 19 Cal.Rptr. 153, 368 P.2d 697	2
Chronicle Publishing Company v. Superior Court (1960) 54 Cal.2d 548, 7 Cal.Rptr. 109, 354 P.2d 637	4
Dahl v. State Bar (1931) 213 Cal. 160, 1 P.2d 977	65, 68
Dudney v. State Bar (1931) 214 Cal. 238, 4 P.2d 770	65
Emslie v. State Bar (1974) 11 Cal.3d 210, 113 Cal.Rptr. 175, 520 P.2d 991	2

Cases:	Pages:
Ewell v. State Bar (1934) 2 Cal.2d 209, 40 P.2d 264	60, 63, 64, 66
Fish v. State Bar (1931) 214 Cal. 215, 4 P.2d 937	58, 59, 60, 63
Geffen v. State Bar (1975) 14 Cal.3d 843, 122 Cal.Rptr. 865, 537 P.2d 1225	6, 59, 60, 63, 64
Goldman v. State Bar (1977) 20 Cal.3d 130, 141 Cal.Rptr. 447, 570 P.2d 463	57, 59, 60
Higgins v. State Bar (1956) 46 Cal.2d 241, 293 P.2d 241	59
Honoroff v. State Bar (1958) 50 Cal.2d 202, 323 P.2d 1003	58, 60, 61
Howe v. State Bar (1931) 212 Cal. 222, 298 P. 25	65, 66, 68
Hutchins v. Municipal Court (1976) 61 Cal.App.3d 77, 132 Cal.Rptr. 158	54
Irving v. State Bar (1931) 213 Cal. 81, 1 P.2d 2	65, 68
Jacobellis v. State of Ohio (1964) 378 U.S. 184, 84 S.Ct. 1676	15, 17
McCue v. State Bar (1935) 4 Cal.2d 79, 47 P.2d 268	58

Cases:	Pages:
Mitton v. State Bar (1958) 49 Cal.2d 686, 321 P.2d 13	60, 61
Penaat v. State Bar (1944) 25 Cal.2d 26, 152 P.2d 442	62, 67
In the Matter of the Proposed Repeal of Rule 2-106, Rules of Professional Conduct, Cal. Sup.Ct. Bar Misc. No. 3922	9
Recht v. State Bar (1933) 218 Cal. 352, 23 P.2d 273	62, 64, 67
Richardson v. State Bar (1942) 19 Cal.2d 707, 122 P.2d 889	62
Ring v. State Bar (1933) 218 Cal. 747, 24 P.2d 821	68
Roth v. State Bar (1937) 8 Cal.2d 656, 67 P.2d 337	58, 62, 69
Sawyer v. State Bar (1934) 220 Cal. 702, 32 P.2d 369	62
Shaw v. State Bar (1931) 212 Cal. 52, 297 P. 532	65, 66, 68
Smallberg v. State Bar (1931) 212 Cal. 113, 297 P. 916	59, 65, 66, 67, 68
Smith, In re Edna (U.S.Sup.Ct. Docket No. 77-56)	6, 7, 10
Smith v. State Bar (1930) 211 Cal. 249, 294 P. 1057	65, 66, 68

Cases:	Pages:
Time, Incorporated v. Pape (1971) 401 U.S. 279, 91 S.Ct. 633	17
Tonini v. State Bar (1956) 46 Cal.2d 491, 297 P.2d 1	58, 59, 60, 62, 69
Townsend v. State Bar (1930) 210 Cal. 362, 291 P. 837	65, 66, 68
Utz v. State Bar (1942) 21 Cal.2d 100, 130 P.2d 277	68
Younger v. State Bar (1974) 12 Cal.3d 274, 113 Cal. Rptr. 829, 522 P.2d 5	7, 57, 60, 61, 63, 64
California Constitution:	
Cal.Const., art. 6, §6	1
Cal.Const., art. 6, §8	1
Cal.Const., art. 6, §9	1
California Business & Professions Code:	
Cal.Bus. & Prof. Code §6001	2
Cal.Bus. & Prof. Code §6008	2
Cal.Bus. & Prof. Code §6008.1	2
Cal.Bus. & Prof. Code §6008.2	2
Cal.Bus. & Prof. Code §§ 6011-6013.5	4

	Pages:
California Business & Professions Code:	
Cal.Bus. & Prof. Code §§6076-6077	5
Cal.Bus. & Prof. Code §6140	4
Cal.Bus. & Prof. Code §§6150-6154	54
California Rules of Professional Conduct:	
Cal. Rules of Professional Conduct, former rule 2 (204 Cal., at p. xci)	6
Cal. Rules of Professional Conduct, rule 2-101	6, 9
Cal. Rules of Professional Conduct, rule 2-102	9
Cal. Rules of Professional Conduct, rule 2-103(A)(5)	9
Cal. Rules of Professional Conduct, rule 2-103(A)(6)	9
Cal. Rules of Professional Conduct, rule 2-103(A)(7)	9
Cal. Rules of Professional Conduct, rule 2-104(C)	7
Cal. Rules of Professional Conduct, Rule 2-104(D)	7

	Pages:
California Rules of Professional Conduct:	
Cal. Rules of Professional Conduct, Rule 2-104(E)	7
Cal. Rules of Professional Conduct, Rule 2-104(F)	7
Cal. Rules of Professional Conduct, rule 2-106(1)	9
Cal. Rules of Professional Conduct, rule 2-106(4)	9
Cal. Rules of Professional Conduct, proposed rule 2-101(A)	6
Cal. Rules of Professional Conduct, proposed interim rule 2-101(A)	6
Federal Regulations:	
37 Fed.Reg. 22937	76
Miscellaneous:	
The Direct Selling Industry: an Empirical Study (1969) 16 U.C.L.A. L.Rev. 883	76
Federal Trade Commission, Cooling-off Period for Door-to-Door Sales -- Trade Regulations Rule and Statement of Basis and Purpose (1972) 37 Fed.Reg. 22933	76

Miscellaneous:	Pages:
Hart, John W., Ambulance Chasing (1931) 6 St.B.J. 79	53
Reasons and Rosenzweig, Auto Accident Victims, Aliens Steered to Ring by Mexican Consulate (3-22-74), L.A. Times	70
Reasons and Rosenzweig, To Mask Illegal Activities Ring Used Hospital Charity (3-19-74) L.A. Times	69
Reasons and Rosenzweig, Profitable Sideline Ring Wrote Medical Reports to Back Claims (3-21-74) L.A. Times	69-70
Reasons and Rosenzweig, Promises of Windfall Settlement, Ring Preyed on Accident Victims in Barrios (3-20-74) L.A. Times	69
Webb, Joseph J., A Message From the President - Rules of Professional Conduct (1928) 2 St.B.J. 207	53

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BRIEF FOR AMICUS CURIAE THE STATE BAR OF CALIFORNIA

INTEREST OF AMICUS CURIAE*

A. Nature of Amicus Curiae

Amicus curiae The State Bar of California (hereinafter "California Bar") is a public corporation which is, under California law, a component of the judicial branch of the state's government.

As such, the California Bar performs essential state governmental functions, including serving as an administrative arm of the Supreme Court of the State of California (hereinafter "California Supreme Court") in attorney admission, discipline and reinstatement matters. Cal.Const., art. 6, §§9, 6, 8; Cal.Bus.

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* The parties to this appeal have consented to the filing of an amicus curiae brief by The State Bar of California. Letters evidencing their consent are on file in the office of the Clerk of this Court.

& Prof. Code, §§6001, 6008, 6008.1, 6008.2; Emslie v. State Bar (1974) 11 Cal.3d 210, 224 [13], 113 Cal.Rptr. 175, 520 P.2d 991; Brotsky v. State Bar (1962) 57 Cal.2d 287, 301 [12, 13], 19 Cal.Rptr. 153, 368 P.2d 697.

With regard to matters of attorney discipline alone, the California Bar operates an elaborate disciplinary court system for the California Supreme Court, at no cost to either the court or the public at large.

This disciplinary system is used extensively. The California Bar receives and investigates over 5,000 disciplinary complaints against California attorneys

each year.*

The annual cost of this disciplinary system is in excess of $1.5 million. This cost is borne solely by the more than

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* For example, a survey of disciplinary matters pending before the California Bar on a single day (February 6, 1975) revealed the following:

Disciplinary Matters Pending	Number
At staff level	1,338
At preliminary hearing level	286
At trial hearing level	219
At disciplinary board level	69
TOTAL	1,921

A similar survey of disciplinary matters pending before the California Supreme Court on a comparable single day (January 7, 1975) revealed the following:

Disciplinary Matters Pending	Number
Proceedings originated by State Bar	43
Proceedings resulting from convictions of crimes	58
Resignations with charges pending	4
Revocation of license	1
Revocation of probation	1
TOTAL	107

54,000 members of the California Bar.*

The California Bar is directed and managed by a Board of Governors (hereinafter "Board"), the members of which are public officers.** Chronicle Publishing Company v. Superior Court (1960) 54 Cal.2d 548, 566 [8], 7 Cal.Rptr. 109, 354 P.2d 637.

The Board is specifically empowered by state law "[w]ith the approval of the

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* The funds are derived entirely from membership fees. The state legislature has placed a ceiling on the California Bar's membership fees (Cal.Bus. & Prof. Code, §6140), and the California Bar has no power to additionally assess its members for any purpose. In recent years the California Bar's membership fees have been at the maximums allowed by the state legislature.

** The Board consists of 15 attorney members elected from geographic districts by California attorneys, and 6 nonattorney members appointed from the state at large by the Governor. Cal.Bus. & Prof. Code, §§6011-6013.5.

[California] Supreme Court, . . . [to] formulate and enforce rules of professional conduct for all members of the bar in the State." Cal.Bus. & Prof. Code, §6076. The rules thus formulated, however, are not binding until approved by the California Supreme Court. Cal.Bus. & Prof. Code, §§6076-6077. Upon such approval, they become rules of that court. Barton v. State Bar (1930) 209 Cal. 677, 680 [2], 289 P. 818.

B. California's Rules Protect the Public From the Risks of Harm Inherent in Ambulance Chasing and Direct Solicitation by Attorneys for Their Own Purposes

Ever since California's Rules of Professional Conduct were first formulated by the Board and approved by the California Supreme Court in 1928, they have prohibited attorneys from soliciting professional employment for their own purposes, either

directly themselves or indirectly through lay intermediaries such as ambulance chasers. See Cal. Rules of Prof. Conduct, former rule 2 (204 Cal., at p. xci); present rule 2-101 (14 Cal.3d, at p. Rules 1); proposed rule 2-101(A); proposed interim rule 2-101(A).*

This fundamental prohibition protects the public from situations which present risks of undue influence, overreaching, misrepresentation and conflicts of interest between attorneys and the persons they seek to represent. See, e.g., Geffen v. State Bar (1975) 14 Cal.3d 843, 122 Cal. Rptr. 865, 537 P.2d 1225; Younger v. State

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* The proposed rules appear at Appendices A and B to the Brief for Amicus Curiae The State Bar of California recently filed in In re Smith (Docket No. 77-56) [hereinafter "Smith"].

Bar (1974) 12 Cal.3d 274, 113 Cal.Rptr. 829, 522 P.2d 5; see also, Argument, infra.

But the foregoing California prohibition is not absolute.

It coexists with other provisions that expressly authorize certain collective activity undertaken to obtain meaningful access to the courts and provide breathing room for this First Amendment right. For example, the rules not only permit, but also foster the development of lawyer reference services (rule 2-104(C)), group legal services (rule 2-104(D)), prepaid legal services (rule 2-104(E)) and legal aid programs (rule 2-104(F)). See, generally, discussion in Brief for Amicus Curiae The State Bar of California in the Smith case.

In addition, almost a year before this Court's decision in Bates v. State Bar of

Arizona (1977) ___ U.S. ___, 97 S.Ct. 2691 (hereinafter "Bates"), the Board proposed to the California Supreme Court extensive -- and experimental -- revisions to California's Rules of Professional Conduct designed to permit greater flow of information about what attorneys do and cost. These proposed revisions would permit information about many California attorneys to be published in expanded, nontraditional and readily-available law lists, legal directories and telephone books, with appropriate prescriptions concerning form and content to foster comparisons and prevent deception. (The proposed rules appear at Appendix A to the Brief for Amicus Curiae The State Bar of California in the Smith case.)

These proposed new California rules were filed in the California Supreme Court

on August 26, 1976 under the title and number, In the Matter of the Proposed Repeal of Rule 2-106, Rules of Professional Conduct, Cal.Sup.Ct. Bar Misc. No. 3922.

Shortly after this Court's decision in Bates, the Board embarked on a review of its earlier proposal in light of Bates. The Board also proposed that until that review can be completed and the result acted upon, the California Supreme Court repeal the existing California Rules of Professional Conduct regarding advertising by attorneys (rules 2-101, 2-102, 2-103(A)(5),(A)(6), (A)(7), 2-106(1) and 2-106(4) [see 14 Cal.3d, at pp. Rules 1-5 and 13-14]) and adopt instead an interim rule containing two fundamental prohibitions: one against false and misleading advertising; and the other against attorneys soliciting professional employment for their own purposes, either

directly themselves or indirectly through lay intermediaries such as ambulance chasers. (The proposed interim rule appears at Appendix B to the Brief for Amicus Curiae The State Bar of California in the Smith case.)

The proposed interim California rule was filed in the California Supreme Court on August 17, 1977 under the same title and number as the Board's prior proposal. It is still pending before the court.

SUMMARY OF ARGUMENT

As is indicated above, California's prohibition against attorneys soliciting professional employment for their own purposes, either directly themselves or indirectly through lay intermediaries such as ambulance chasers, protects the public from situations which present risks of undue influence, overreaching, misrepresentation and conflicts of interest between attorneys and the persons they seek to represent. See, supra, pp. 5-7; see also, Argument, infra.

The protection thus afforded California citizens would be seriously impaired or abolished should this Court fail to affirm the action of the Supreme Court of Ohio (hereinafter "Ohio Supreme Court") in the Ohralik case.

The California Bar strongly believes that the prohibition against solicitation by attorneys is crucial to not only protecting the public from risks of harm, but also the creation of attorney-client relationships and the maintenance of the public's confidence in the system of administration of justice in this country.

Consistent with its strong belief in the necessity for the prohibition against solicitation, the California Bar, in proposing amendments to California's Rules of Professional Conduct so as to permit advertising by lawyers, has not eliminated the fundamental prohibition against attorneys soliciting professional employment for their own purposes.

To advertise availability in the newspapers so as to help interested persons locate appropriate attorneys for perceived legal problems is one thing; the reader can prepare and choose whether or not to initiate contact and, if so, with whom.

But it is a wholly different thing to allow attorneys to focus all of their oral advocacy skills upon persons, often in home or hospital, so as to at once create or heighten an apparent need for legal representation and at the same time sell that particular attorney's services to meet the need. The person in such a situation is often emotionally distraught, has neither prepared for nor initiated the contact, and may have great difficulty in terminating the contact without agreeing to retain the attorney.

Should this Court choose to decide

the Ohralik case on the present state of the record, the California Bar respectfully urges the Court to recognize that the balance of competing interests should be struck in favor of the prohibition against attorneys soliciting professional employment for their own purposes.

Since the opinion below was handed down before this Court's decision in Bates and omits any discussion of the Ohio Supreme Court's weighing of Ohralik's First Amendment claim vis-a-vis the strong public interests served by the prohibition against solicitation, this Court may wish to remand this case to the Ohio Supreme Court for such discussion. See Bigelow v. Virginia (1975) 421 U.S. 809, 826, 95 S.Ct. 2222, 2235; compare 48 Ohio St.2d, at pp. 219-220, 357 N.E.2d, at p. 1098, Juris.Stmt., pp. 3a-4a.

Nonetheless, the record in this case reveals that Ohralik engaged in misconduct which gave rise to situations presenting precisely the kinds of risks to the public and the system of administration of justice that the prohibition was designed to prevent. See Statement of Facts Revealed by the Record, infra.

It is well settled that in First Amendment cases such as this one, this Court has a duty to decide the facts for itself. See, e.g., Jacobellis v. State of Ohio (1964) 378 U.S. 184, 189-190, 84 S.Ct. 1676, 1678-1679. In light of this Court's duty and the risks of harm revealed by the record herein, the Court may wish to proceed despite the Ohio Supreme Court's omission. If this Court does proceed, it should preserve the protections afforded citizens and the administration of justice

by the prohibition against attorneys soliciting professional employment for their own purposes.

SUMMARY OF FACTS REVEALED BY THE RECORD

In its opinion below, the Ohio Supreme Court summarized the facts of this case only briefly. In addition, the parties to this appeal have presented to this Court conflicting and somewhat confusing versions of the pertinent facts. For the convenience of this Court, these versions are tabulated side-by-side in Appendix A, infra.

In Time, Incorporated v. Pape (1971) 401 U.S. 279, 284, 91 S.Ct. 633, 636-637, this Court requoted "the settled principle that '[i]n cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded.'" (Emp. added, citations omitted.) See also, e.g., Jacobellis v. State of Ohio (1964) 378 U.S. 184, 189-190, 84 S.Ct. 1676, 1678-1679.

To assist this Court in such reexamination, the California Bar presents the following detailed summary of the facts revealed by the record:

A. Carol and Wanda Were Seriously Injured in an Automobile Accident

Early in the morning of February 2, 1974, Carol McClintock (hereinafter "Carol") was driving Wanda Lou Holbert (hereinafter "Wanda") home from a dance when a vehicle driven by a drunk driver crossed the centerline and struck their car.

Carol suffered two broken legs, face lacerations, contusions and eye injuries (App. 44a*) and remained in the hospital in traction for six weeks (App. 30a). Wanda suffered head injuries, cracked ribs and a broken pelvis (App. 121a).

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* References to "App ___" are to the printed Appendix. References to "J.S. App. ___" are to the appendices printed at the end of the Jurisdictional Statement. References to "Tr. ___" are to the transcript of the hearings before the hearing panel of the Ohio Board of Commissioners on Grievances and Discipline which have not been included in the printed Appendix.

Both Carol and Wanda lived in Montville, Ohio. Both of the girls were eighteen years old, Carol having celebrated her birthday just three weeks earlier (App. 110a). Carol had recently graduated from high school but was unemployed, having been temporarily laid off her job (App. 100a). Wanda was attending night school to complete the last two or three units needed to graduate and working thirty hours a week at a nearby rest home (App. 122a, 126a).

B. Ohralik Hardly Knew Carol and Wanda Prior to the Accident

Appellant Albert Ohralik (hereinafter "Ohralik") also resided in Montville, but he maintained his principal office for the practice of law in Cleveland, Ohio.*

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* Notwithstanding the assertion by Ohralik's counsel that he had been a "prominent and esteemed attorney" in Montville for many years preceding these events (Brief for Appellant [hereinafter "B.A."], p. 9), the record contains no evidence supporting this claim.

Carol and Ohralik recognized each other. They had often met at the post office when picking up mail. But the extent of their acquaintanceship is sharply disputed.

Carol testified that she did not know that Ohralik was a lawyer and that nothing personal was ever mentioned in their exchanges of greetings at the post office (App. 38a). Ohralik claimed that they talked about "what was new in the life of a teenager" (App. 50a). He didn't, however, know that Carol was one of eight children (App. 110a). Although Carol knew that her parents had purchased an automobile from Ohralik when she was twelve or thirteen years old (App. 36a), they did not belong to the same organizations or church, and they did not meet socially (App. 71a).

Ohralik contends (B.A. 9) that Carol

must have known he was an attorney because that fact was reflected on campaign literature he had used in past unsuccessful elections, and because he had an "attorney at law" sign in front of his home (App. 72a).

However, there is no evidence in the record that Carol, who was too young to vote in those elections, had ever seen any of that literature, or that she had ever gone past Ohralik's house.

Ohralik's relationship with Wanda prior to the accident was even more tenuous.

He recognized her face from chance meetings at the post office, but he did not know her name (App. 78a), and he couldn't recall whether they had ever spoken (App. 68a). Ohralik admitted that prior to visiting Wanda after the accident, he did not know the family (App. 80a).

It is undisputed that Ohralik was not related in any way to either of the girls and that neither of them had ever been his client. The Disciplinary Board found that they were, if anything, casual acquaintances of Ohralik's (J.S.App. 1a, 12a).

C. Ohralik Solicited Carol

1. Ohralik First Telephoned Carol's Home

On the morning of February 13, 1974 Ohralik telephoned the McClintock residence for the ostensible purpose of inquiring about Carol's condition* (App. 44a, 51a).

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* Ohralik claimed to have first learned of the accident from the postmaster's brother on February 4 or 5 (App. 49a). However, he also testified that, despite his concern for a woman he considered his "friend" (App. 89a), he made no effort to contact Carol or her family and did not discuss the accident with anyone (App.69a, 70a) until February 13, when the postmaster's brother "reminded" him of Carol's injury (App. 50a).

(footnote continued on next page)

Descriptions of this conversation by Mrs. McClintock, on the one hand, and Ohralik, on the other, are strikingly different.

Mrs. McClintock testified that Ohralik asked about Carol's injuries and "wanted to know if he could go and see her, he might be of some help to her" (App. 44a). He ascertained that the McClintocks (not Carol) owned the car, that they had insurance on it and that they had not yet retained an attorney, although one had been

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(footnote continued from preceding page)

While Ohralik took no action to convey his asserted concern for over a week following the accident, by 1:00 p.m. on the 13th he had (1) discussed with his brother whether they should visit Carol, (2) telephoned Mrs. McClintock, (3) visited Mr. and Mrs. McClintock in their home, (4) driven one-half hour to Painesville, (5) visited Carol in the hospital, (6) driven back to Montville, (7) stopped to take photographs of the accident scene, (8) stopped again to pick up his tape recorder and (9) returned to the McClintocks' residence. (See infra, pp. 26-37).

recommended to them by the hospital administrator. Mrs. McClintock also told Ohralik that because Carol was 18, the decision whether to prosecute a claim would be up to her. Ohralik told Mrs. McClintock that he was experienced in insurance matters and that he could take care of everything for them, and he asked if he could come to the McClintocks' residence to discuss the matter (App. 44a-46a).

Although Ohralik agrees that the subject of lawyers arose, he contended that Mrs. McClintock first mentioned it. He also testified that she asked whether he was going to see Carol that day, and when he responded affirmatively, she asked, "would you please stop at our house before you go" (App. 51a).

2. Ohralik Claims to Have Visited Carol's Parents Before Going to the Hospital

Ohralik unequivocally asserts that he went to the McClintocks' residence twice on February 13th. According to Ohralik, the so-called "first" visit occurred at approximately 10:00 a.m., in response to Mrs. McClintock's request (App. 51a). Ohralik testified that during this meeting the McClintocks expressed concern that Wanda might sue them, and he allayed these fears by explaining the Ohio guest statute (App. 52a). According to Ohralik, the "second" visit occurred about 1:00 p.m., after he had met with Carol at the hospital, and he tape recorded this "second" visit unbeknownst to the McClintocks (see App. 92a-117a).*

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* Ohralik secretly tape recorded two

(footnote continued on next page)

(footnote continued from preceding page)

conversations, one with Carol's parents following his visit with Carol in the hospital, and the other with Wanda.

Counsel for Ohralik contends that "No question was raised . . . reflecting on the authenticity, the accuracy or the virtual completeness of the tapes" (B.A. 7). However, this assertion is not supported by the record.

The tape of the conversation with Mr. and Mrs. McClintock, on its face, reflects several omissions. (See detailed discussion, infra, footnote* pp. 38-39.)

In addition, Wanda testified that the transcription of her conversation with Ohralik was incorrect in that it omitted his first words to her - - that he represented Carol and would like to talk about representing Wanda as well. (See detailed discussion, infra, pp. 42-43.)

According to Ohralik, both recordings were made on one side of a cassette containing sixty minutes of recording time per side (App. 88a-89a). Although he had previously testified that he had not altered the tapes in any way (App. 56a), on further examination Ohralik admitted that he had made a recording from one side of the original tape onto a second tape, and then from the second tape to the reverse side of the original tape, so that both sides of the original tape contained the same material (App. 87a-88a). At the time of the hearing, Ohralik was unable to identify which side of the original tape contained the original recording (App. 83a). Nor did Ohralik give any reason for having copied the original tape. In fact, he stated that

(footnote continued on next page)

However, despite counsel's assertion that it is "clear" the "first" visit occurred (B.A. 15), there is no evidentiary support for this in the record other than Ohralik's own testimony.

Ohralik's account is flatly contradicted by Mrs. McClintock, who consistently testified that they met only once (Tr. 151, 169, 170; App. 48a).

She stated that this meeting occurred shortly after noon and a few hours after Ohralik's telephone call (Tr. 166). She

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(footnote continued from preceding page)

he had never made copies of tapes in any other matter (App. 84a).

In evaluating Ohralik's contentions regarding these tapes, it must be remembered that he alone knew that the conversations were being recorded, that he operated the start and stop controls and that the tapes remained in his sole possession until he delivered them to the hearing panel over one year after they were made (App. 56a).

testified that during this meeting Ohralik reviewed their auto insurance policy, discussed the Ohio guest statute and received directions to Wanda's (App. 48a). She was also certain that Ohralik went directly to Wanda's after leaving the McClintocks' home because she remembered watching from the window as he walked across the street to Wanda's (Tr. 168). Mrs. McClintock's description of this one meeting with Ohralik matches the transcribed conversation of Ohralik's "second" meeting (see App. 92a-117a).

The hearing panel of the Ohio Board of Commissioners on Grievances and Discipline, which heard the testimony and was in the best position to evaluate the credibility of the witnesses, resolved the dispute against Ohralik and found that the "first" meeting alleged by Ohralik had not, in fact, occurred (J.S.App. 12a).

3. Ohralik Visited Carol at the Hospital

After the telephone conversation with Ohralik, Mrs. McClintock telephoned Carol to advise her that Ohralik might be coming to see her regarding whether she needed an attorney (App. 41a, 47a). She did not recommend his services, but told her daughter that, since she was 18, the decision would be up to her.

Ohralik testified that his sole purpose in going to the hospital was "[t]o make a social call, to chat" (App. 52a).

Wanda and Carol had shared a room in the hospital, but Wanda was being discharged that morning at about the time Ohralik arrived (App. 127a). He later told Wanda that he had seen her family at the hospital but had hidden from them. According to the transcript of that tape recorded conversation, Ohralik said (App. 129a):

> "I was going to take pictures there but I was waiting for them to leave. I didn't want them to see me. I was sitting around waiting for them to leave. I don't know if they noticed that. I had a camera in my pocket. When they left I took about 8 pictures of Carol and all of the traction."*
>
> (Emp. added.)

During Ohralik's conversation with Carol, which they both agree lasted approximately 45 minutes (App. 32a, 53a), Carol lay in her hospital bed, in traction and

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* The reason Ohralik did not want Wanda's parents to see him is not disclosed by the record.

With regard to the pictures Ohralik took of Carol, he later told Carol's parents that he took them because he thought they would be useful if there was any "argument" (App. 92a).

heavily trussed.* No other person was present, and Ohralik did not tape record the conversation.

Carol's and Ohralik's accounts of this meeting differ greatly.

Carol testified (App. 31a):

> "He came into the hospital and told me that he was a lawyer and that he had talked to my mom and dad; and they called me and said that he had been to the house and that he wanted to come up and talk to me; and that he came up - well, he came up to the hospital and said that he was a lawyer and that he had heard at the Post Office that I had been in a car accident and that I would need a lawyer.
>
> "He said that my bed was by a window overlooking the emergency entrance to the hospital when the ambulances came in, and that he had cards with him, and he said that I could chase ambulances for him, and he gave me some cards."
>
> (Emp. added.)

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* In her letter discharging Ohralik, Carol also stated that she was on medication at the time of this visit (App. 35a). There is no evidence in the record to contradict this, and Ohralik admitted he did not inquire at the time of his visit whether Carol had taken any medication (App. 74a).

She also testified that Ohralik read a typed retainer contract to her, but that she refused to sign it, indicating she wanted to discuss the matter with her parents before making any decision (App. 31a, 32a).*

Ohralik claims he told Carol it was a "mess how a drunk driver could cause her those problems"** (App. 53a), and that he commented on the butterflies with which she had decorated her room. He also "commiserated with her on how she was

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* Subsequently, on February 15, 1974, Carol did sign the contract (App. 32a, 59a).

** The source of Ohralik's knowledge that the other driver had been drinking is not revealed by the record.

trussed up with pulleys and how confining it was, and then she brought up in the conversation that some hospital administrator was urging a lawyer upon her, and I chuckled and I said 'Yes, this certainly is a case that would entice a lawyer. That would interest him a great deal'" (App. 53a). Finally, he testified that Carol asked him to tell her parents to call on her that evening to discuss the matter further (App. 54a).*

They may have discussed more than Ohralik relates. The transcripts of the two tape recorded conversations reveal that, by the afternoon of the 13th, Ohralik had

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* Carol did not admit making such a request, and it is inconsistent with the uncontroverted fact that she telephoned her parents shortly after Ohralik left her hospital room to ask their advice about him (App. 46a, 47a, 108a).

considerable knowledge about the accident, but he denies having done any investigation prior to that day (App. 85a).

For example, in his subsequent conversation with the McClintocks,* Ohralik indicated he had spoken with Carol about the location of the car wreckage (App. 92a) and also about Carol's having been laid off her job (App. 100a). The tape reflects that he also knew the general circumstances of the accident (App. 105a), that the other driver was in the same hospital (App. 93a), that he was uninsured (App. 95a), that the owner of the car was named Bennett (App. 99a), that Wanda lived near the McClintocks (App. 95a), and that Ohralik had had a conversation with Wanda's relative (App. 95a). The transcript also

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* See, infra, pp. 38-41.

corroborates Carol's testimony that Ohralik asked to be her attorney (App. 93a).

The taped conversation with Wanda* reveals that Ohralik knew the girls had been returning from a dance and that the accident occurred at about 2:00 a.m. (App. 119a).

In addition, Ohralik was sufficiently acquainted with the facts that he was able to locate and photograph the accident scene, as well as make the one-half hour drive from the hospital to the McClintocks' residence (stopping at his own house to pick up his tape recorder) in only one hour (App. 86a, 90a).

Although Carol told Ohralik that she wanted to talk to her parents before making any decision, he left her with the impression that he would "get the insurance stuff

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* See, infra, pp. 41-46.

and papers and find out what kind of coverage of insurance that there was, and that he would take care of everything, and let me know what was going on" (App. 32a).

4. Ohralik Then Returned to the McClintocks' Home

After leaving the hospital about noon, Ohralik drove to the McClintocks' residence, stopping along the way to take photographs of the accident scene and to pick up his tape recorder at his home (App. 86a, 90a). He arrived at the McClintocks' residence about 1:00 p.m. (App. 90a).

Ohralik testified that his sole purpose in going there was to convey Carol's alleged request that her parents visit her that evening to discuss the possibility of his being retained by Carol (App. 86a, 87a). According to Ohralik, he brought his tape recorder along because "I never knew what might develop when I was over there" (App. 87a).

The conversation with the McClintocks was recorded without their knowledge. Ohralik's tape recorder was on the kitchen table hidden under his raincoat* (App. 54a).

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* Although Ohralik contends that the tape of this conversation is complete, several omissions are reflected on the face of the transcript itself.

For example, at the end of the transcript, Mrs. McClintock asked Ohralik's opinion of two attorneys whose names she had "just" mentioned to him (App. 117a), but her mentioning of the names is not on the tape. Nor is there anything on the tape which reflects the statements made by Ohralik to induce the McClintocks to show him their insurance policy and to discuss the matter in detail prior to any confirmation that Carol had decided to retain his services. Finally, when Ohralik told the McClintocks that Carol had asked him to ask them to visit her, he went on to say "but Mr. McClintock thinks that she phoned you folks since then" (App. 108a). The conversation between Mr. McClintock and Ohralik conveying this information is also absent from the tape.

Ohralik himself impliedly raised a question regarding the completeness of the tape when he testified that the tape

(footnote continued on next page)

The transcript of the tape recording reveals that Ohralik did not learn, until nearly two-thirds of the conversation was over, that Carol had decided to retain him. Prior to that time (and thus prior to his knowledge that an attorney-client relationship had been created), Ohralik examined the McClintock's insurance policy (App. 93a), discussed the Ohio guest statute (App. 96a), opined that Wanda's family could not successfully sue the McClintocks (App. 104a), explained the uninsured motorist provision of the policy (App. 99a) and discussed in general the process of filing and negotiating a claim. He also suggested speaking with Wanda, to "calm her down" if she was

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(footnote continued from preceding page)

contained all of the conversation "that pertains to the discussion accident [sic]" (App. 55a).

See also the general discussion of the tapes, <u>supra</u>, fn.* at p. 26.

thinking of suing the McClintocks (App. 97a). Finally, he reviewed the circumstances of the accident and got the names of all the insurance company agents and adjusters who had contacted Carol or the McClintocks (App. 107a).

Only after having gotten all this information from the McClintocks, did Ohralik (a) state his purpose in visiting and (b) learn that he had been retained.*

This portion of the conversation was transcribed as follows (App. 108a):

> "Al [Ohralik]: Mrs. McClintock, Carol had asked me to ask you folks to visit her tonight to talk with her, but Mr. McClintock thinks that she phoned you folks since then.

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* The balance of the conversation contains little of substance, and is devoted mainly to a discussion of prior accidents which the McClintocks' children had had (App. 108a-117a).

> "Mrs. [McClintock]: Yes she did.
>
> "Al [Ohralik]: I see.
>
> "Mrs. [McClintock]: She said tell you to go ahead with it.
>
> "Al [Ohralik]: All right, fine."

D. Ohralik Solicited Wanda at Her Home Immediately After Leaving the McClintocks

Upon leaving the McClintocks' home, Ohralik went directly to see Wanda.

When he arrived at Wanda's home, it was approximately 1:50 p.m., and Wanda had been home from the hospital for a little more than 2 hours (App. 127a). She was recovering from injuries which included cracked ribs and a broken pelvis, and she could walk only with the assistance of crutches (App. 121a).*

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* She told Ohralik that she was still in considerable pain (App. 130a).

The door was answered by Wanda's brother (App. 10a).

There are two different versions of what happened next.

Wanda testified that (App. 21a):

> "Mr. Ohralik stepped inside the house and told me who he was and that he was representing [Carol] as her attorney, . . . and that he would also like to talk to me about it and represent me as my attorney."

See also App. 14a.

Ohralik denied Wanda's account. He claimed that he said nothing but what is reflected on the recording (except perhaps "goodbye") (App. 58a-59a), that he surreptitiously made of his conversation with Wanda. But the recording does not reflect Ohralik's arrival at the home, and he did not explain how he, an admitted stranger to the family (App. 80a), gained access to the home, obtained Wanda's consent to talk with him, and looked for a

"convenient" place to sit (trying the sofa before deciding on the dining room table) - all without speaking a word (App. 58a).

In any event, Wanda consented to talk with Ohralik.

Wanda's mother was not at home when Ohralik called, and no other adult was present during his conversation with Wanda, although several other people were in the house.

Ohralik's conversation with Wanda was tape recorded by him without Wanda's knowledge.*

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* A transcript of the tape recording appears at App. 118a, et seq.

Wanda testified that this transcript was incomplete because it did not reflect Ohralik's first words to her. She further testified that about ten unrecorded minutes of conversation elapsed between Ohralik's first words to her and the first statement on the tape recording (App. 20a).

See also the general discussion regarding the tape recordings, supra, fn.* at p. 26.

Ohralik's first tape recorded statement to Wanda contains, in light of his own testimony, at least two patent misrepresentations. He told Wanda (App. 118a):

> "We . . . ah they asked me to go and talk with Carol. They said that this drunk didn't have any insurance. No! Well it's not that bad, see . . . Of course they've hired me as their lawyer. I'm Carol's lawyer now."
>
> (Emp. added.)

("They" apparently refers to Mr. and Mr. McClintock.)

But it was Ohralik who suggested to the McClintocks that he meet with Carol, and Ohralik has consistently asserted that he was hired by Carol, not by her parents (App. 54a).

Ohralik followed these misrepresentations by explaining to Wanda the uninsured motorist provision in the McClintock's policy. He concluded by giving her "a little tip" that she had "a good claim, see, for up to

$12,500.00" (App. 119a).

After ascertaining that Wanda was 18 years old, Ohralik asked her four or five questions regarding the circumstances of the accident. These questions demonstrated his considerable knowledge of the circumstances, including the fact that the girls were on their way home from a dance. Wanda supplied no information, merely confirming the information contained in his questions. She did tell him she had hit her head on the dash and had seen nothing of the accident (App. 120a).

Ohralik then volunteered to represent Wanda. He told her it wouldn't cost her anything because he would be paid one-third of the recovery. He told her "all you'd have to do is tell me its O.K. and I would represent you if you want." She replied O.K. (App. 120a).

He then wrote down her name (which he misspelled), reaffirmed that she was 18 and asked questions regarding her parents and her employment.

Ohralik repeatedly told Wanda not to speak to anyone, particularly insurance adjusters, about the accident; and he assured her that he would be able to get a large recovery for her, partly by describing his success in a recent case (App. 127a).

E. Wanda Subsequently Attempted to Discharge Ohralik

The next morning Ohralik telephoned Wanda's home (App. 23a).

Wanda's mother, a widow with eleven children, answered the telephone. She told Ohralik in no uncertain terms that they had decided not to sue anyone and that his services as an attorney were not desired (App. 23a). Ohralik responded that Wanda was a competent adult and could speak for

herself.* Wanda's mother reiterated that they did not want to sue and did not want Mr. Ohralik for an attorney.

At that point in the conversation, according to Wanda's mother, Ohralik told her: "[D]id you know you could sue McClintocks." When Wanda's mother again replied they didn't want to sue anyone, Ohralik said, "I saw an insurance policy that McClintocks have, and you can sue them for more money than you got" (App. 24a).

These statements are directly contradictory to the assurances he had given the McClintocks the previous day that Wanda could not sue them. See, supra, p. 39.

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* Ohralik did not attempt to reconcile or explain his willingness to accept Carol's mother as Carol's authorized agent to retain him on February 13, with his refusal to accept Wanda's mother as Wanda's authorized agent to discharge him on February 14.

Ohralik denied making these statements, but he did admit to giving Wanda's mother a "lot of free advice" that "she could work with . . . herself" (App. 81a).

Ohralik never attempted to telephone Wanda again. But on February 28, he sent to her, by mail, a written retainer agreement and medical information release forms. She did not sign or return them (App. 17a).

Subsequently, on March 14, 1974, Wanda wrote to Ohralik stating, "I do not wish to sue anyone so, would you please contact anyone that you informed and tell them you are not my attorney, that is if you have told anyone. Thank you." (App. 16a-17a).

On February 13th, immediately after seeing Wanda, Ohralik had written to the insurance company asserting that he represented both girls (App. 85a). Despite Wanda's request in her letter terminating his employ-

ment, Ohralik refused to advise the insurance company that he no longer represented Wanda.

Instead, he asserted that he had a valid contract and was entitled to payment in excess of $2,000 (App. 26a-27a). The insurance company had indicated to Wanda that it would honor her claim against the policy, but it refused to release the funds to her until the matter of Ohralik's claimed fee had been resolved (App. 26a). Wanda was compelled to hire another attorney to resolve the matter (App. 19a), and payment to her was delayed by several months (App. 26a-27a).*

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* Ohralik did not express concern over this delay, despite his knowledge from his meeting with Wanda that Wanda's mother had signed a confession of judgment in favor of the hospital to secure payment of the hospital bills (App. 124a).

Ohralik continued to assert, at the time of the hearing, that he had a valid and enforceable agreement with Wanda, but he testified that he would abandon his claim against her because of his belief that an ethical question arises "if a contract has its origin in a controversy" (Tr. 256). However, four days after volunteering this testimony, Ohralik sued Wanda for the full sum of $2,466.66 which he claimed was due him. See Motion to Dismiss, p. 9.

F. Carol Also Attempted to Discharge Ohralik

Carol testified that she became dissatisfied with Ohralik's services because she was unable to contact him after being discharged from the hospital. Finally, despite her body cast, she had to go to his home unannounced in order to see him. When she did so, he displayed a callous disregard

for her situation (App. 33a-34a).

She thereupon retained new counsel and discharged Ohralik by certified letter on April 12 (App. 34a-35a). Despite her statement in the discharge letter that she had been under the influence of drugs when he visited her in the hospital (App. 35a), Ohralik adamantly maintained that he had a valid and binding contract with Carol, and insisted that it be enforced (App. 35a). He subsequently sued her and accepted a settlement for the full amount of $4,166.66 (App. 42a). Carol also incurred fees of $900 for her new attorney (App. 42a).

ARGUMENT

IN THE EVENT THIS COURT UNDERTAKES THE REQUISITE CONSTITUTIONAL BALANCING ITSELF, THE BALANCE SHOULD BE STRUCK IN FAVOR OF THE PROHIBITION AGAINST ATTORNEYS SOLICITING PROFESSIONAL EMPLOYMENT FOR THEIR OWN PURPOSES

A. Introduction

The prohibition against attorneys soliciting professional employment for their own purposes, either directly themselves or indirectly through lay intermediaries such as ambulance chasers, protects the public from very real risks of harm. It also serves to foster and preserve the attorney-client relationship and to prevent serious impairment of the public's confidence in the system of administration of justice.

Unlike many other states, California has a rich body of published legislative history and court opinions* concerning the

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* For the convenience of this Court, citations to these opinions are listed in Appendix B.

public interests that led to adoption of California's prohibition and compel its continuation.

B. The California Prohibition Was Formulated by the California Bar and Approved by the California Supreme Court in Response to Strong Public Outrage at Solicitation

California's prohibition was not adopted at the urging of attorneys alone, but rather of the public at large. The rules embodying the prohibition were formulated by the California Bar and approved by the California Supreme Court in response to strong public outrage at widespread solicitation and the resultant overreaching, overcharging, underrepresentation and misrepresentation by attorneys. See, e.g., Hart, John W., Ambulance Chasing (1931) 6 Cal. State Bar J. 79-85; Webb, Joseph J., A Message From the President - Rules of Professional Conduct (1928) 2 Cal. State Bar J. 207.

The same public outrage later resulted in enactment by the California Legislature

of a criminal misdemeanor statute which complements California's Rule of Professional Conduct by outlawing ambulance chasing. Cal.Bus. & Prof. Code, §§6150-6154; see Hutchins v. Municipal Court (1976) 61 Cal.App.3d 77, 132 Cal.Rptr. 158.

In the Hutchins case, a California Court of Appeal held that an attorney could be convicted of aiding and abetting and conspiring with certain lay persons acting as runners or cappers in the solicitation of professional employment for the attorney. In doing so, the Court noted that (61 Cal. App. 3d, at pp. 85-86):

> "The legislative history of Business and Professions Code sections 6151 through 6154 goes back 45 years to the enactment of chapter 1043 of the Statutes of 1931. . . .
>
> "The 1931 legislation was a reaction to scandalous conditions which became notorious in the late 1920's arising out of 'ambulance chasing' activities of lawyers, insurance adjusters, and claim agents. In 1929 and 1930, the State Bar created a committee on ambulance chasing and set up local

> administrative committees in various cities to undertake a complete investigation of such cases and to recommend discipline of attorneys under the State Bar Act for violation of the then recently adopted rules 2 and 3 of the Rules of Professional Conduct. [4 State Bar J. 160-161 (1930); 4 State Bar J., Pt. 2, 28 (1929); 5 State Bar J. 358 (1930); 5 State Bar J., Pt. 2, 33 (1930).]
>
> "The local administrative committees investigated and made disciplinary recommendations in numerous cases. Meanwhile, the legislation which became chapter 1043 in the 1931 Legislature, Assembly Bill No. 319, was supported by the State Bar's committee on ambulance chasing. [6 State Bar J., Pt. 2, 33, 34 1931).] Upon its passage, the State Bar committee on ambulance chasing and the president of the State Bar expressed satisfaction that it would go far in helping to eliminate the problem of solicitation of business by members of the bar. [6 State Bar J. 166-167 (1931); 6 State Bar J., Pt. 2, 34 (1931).]
>
> "Subsequent to the legislation, the local administrative committee in Los Angeles remained active, and cooperated with local prosecuting authorities in investigation of more ambulance chasing activities in the mid-1930's. [Biby, Ambulance Chasers (1935) 10 State Bar J. 42; Biby, Chasing Ambulance Chasers (1936) 11 State Bar J. 97.]

"Recently attention was again drawn to this problem by a series of articles in the Los Angeles Times in March 1974, alleging an ambulance chasing ring was operating at the Los Angeles County Medical Center. The State Bar has been involved in investigation of that problem. [State Bar Reports (Apr. 1974) page 1; State Bar Reports (Oct. 1974) page 1.] According to the amicus brief submitted by the State Bar in this case, the Los Angeles County District Attorney and the Los Angeles City Attorney, at the suggestion and with the active cooperation of the State Bar, are now actively prosecuting attorneys involved in running and capping operations."

(Pertinent footnotes in brackets; other footnotes omitted.)

C. The Prohibition Protects the Public From Situations Which, by Their Very Nature, Subject the Public to Risks of Invasions of Privacy, High-Pressure Salesmanship, Undue Influence, Overreaching, Misleading and Deceptive Practices, Divided Loyalties, Inadequate Representation and Other Breaches of Fiduciary Duties

Both the California criminal misdemeanor statute and Rule of Professional Conduct have stood since their enactment to protect the

public from situations which present very real risks of harm.

In numerous cases the California Supreme Court has imposed discipline on attorneys for direct solicitation and ambulance chasing.

Analysis of the types of behavior which have warranted discipline is revealing.

Often the attorney or his associates have engaged in activities (such as hospital room attempts to sell the attorney's services) which, by their very nature, lend themselves to overreaching.*

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* See, e.g., Goldman v. State Bar (1977) 20 Cal.3d 130, fn. 6 (Counts 3 and 4) at 136-137; 141 Cal.Rptr. 447, 570 P.2d 463 (associates of attorneys offered to pay friend of deceased accident victim if he would arrange for attorney to represent victim's parents; in another count, associates contacted work supervisor of automobile accident victim); Younger v. State Bar (1974) 12 Cal.3d 274, 113 Cal.Rptr. 829, 522 P.2d 5 (attorney or his associate

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Even when the prospective client is not hospitalized, elements of overreaching can be present. The attorney or his associates may travel to the home of the prospective client and apply classic "foot in the door"

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frequently solicited in hospital where prospective clients were being treated; in one count, solicitation occurred day after serious injury and patient's eye was swollen shut so as not able to read retainer agreement; in another count, solicitation occurred three days after injury while prospective client was "in a lot of pain"); Honoroff v. State Bar (1958) 50 Cal.2d 202, 204-207, 323 P.2d 1003 (Los Angeles attorney and his associate traveled to Illinois to solicit clients taken from "serious condition" list of train accient); Tonini v. State Bar (1956) 46 Cal. 2d 491, 492-495, 297 P.2d 1 (solicitations by attorneys and their agents within one day of serious injuries); Roth v. State Bar (1937) 8 Cal.2d 656, 657-658, 67 P.2d 337 (two clients solicited at hospital); Fish v. State Bar (1931) 214 Cal. 215, 218 and 220, 4 P.2d 937 (solicitation by associate within one day of serious burns; solicitation in hospital by attorney); see also, McCue v. State Bar (1935) 4 Cal.2d 79, 80, 47 P.2d 268.

salesmanship.* When the prospective client is unavailable or uncooperative, the attorney or his associates may solicit from

* See, e.g., Goldman v. State Bar (1977) 20 Cal.3d 130, fn. 6 (Counts 1 and 2) at p. 136, 141 Cal.Rptr. 447, 570 P.2d 463 (associates of attorneys solicited at homes of persons injured in automobile accidents); Geffen v. State Bar (1975) 14 Cal.3d 843, 849, 122 Cal.Rptr. 865, 537 P.2d 1225 (solicitation by associates at prospective client's home; person solicited was not wearing her eyeglasses and was induced to sign retainer agreement which she believed was insurance investigation form); Tonini v. State Bar (1956) 46 Cal.2d 491, 493, 297 P.2d 1 (attorney or his associate telephoned relatives of deceased one day after the death; three days later, attorney appeared at family home); Higgins v. State Bar (1956) 46 Cal.2d 241, 243-244, 293 P.2d 241 (solicitation by two agents at parent's home one week after child's injury; return visit one week later by attorney and his associate; in another count, solicitation by two agents at parents' home day after child's injury); Fish v. State Bar (1931) 214 Cal. 215, 219, 4 P.2d 937 (solicitation by associate using "high pressure" salesmanship at home of injured woman "almost immediately" after she left hospital); Smallberg v. State Bar (1931) 212 Cal. 113, 117, 297 P. 916 (solicitation by agent and his "clerk" at home of seriously injured prospective client).

friends and relatives.* Frequently the prospective client or the relative resists the entreaties. Undaunted, the attorney or his associates make subsequent solicitations in an effort to procure clients.**

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* See, e.g., Goldman v. State Bar (1977) 20 Cal. 3d 130, fn. 6 (Counts 3 and 4) at pp. 136-137, 141 Cal.Rptr. 447, 570 P.2d 463; Younger v. State Bar (1974) 12 Cal.3d 274, 282, 113 Cal.Rptr. 829, 522 P.2d 5; Best v. State Bar (1962) 57 Cal.2d 633, 635, 21 Cal.Rptr. 589, 371 P.2d 325; Honoroff v. State Bar (1958) 50 Cal.2d 202, 206, 323 P.2d 1003; Mitton v. State Bar (1958) 49 Cal.2d 686, 688, 321 P.2d 13; Tonini v. State Bar (1956) 46 Cal.2d 491, 495, 297 P.2d 1; Ewell v. State Bar (1934) 2 Cal.2d 209, 210, 40 P.2d 264; Fish v. State Bar (1931) 214 Cal. 215, 218, 4 P.2d 937.

** See, e.g., Goldman v. State Bar (1977) 20 Cal.3d 130, fn. 6 (Counts 4-6) at p. 137, 141 Cal.Rptr. 447, 570 P.2d 463; Geffen v. State Bar (1975) 14 Cal. 3d 843, 847-852, 122 Cal.Rptr. 865, 537 P.2d 1225; Younger v. State Bar (1974) 12 Cal.3d 274, 280, 113 Cal. Rptr. 829, 522 P.2d 5; Mitton v. State Bar (1958) 49 Cal.2d 686, 688, 321 P.2d 13; Tonini v. State Bar (1956) 46 Cal.2d 491, 494, 297 P.2d 1; Higgins v. State Bar (1956) 46 Cal.2d 241, 243, 293 P.2d 241; Ewell v. State Bar (1934) 2 Cal.2d 209, 210 and 217, 40 P.2d 264; Fish v. State Bar (1931) 214 Cal. 215, 218, 4 P.2d 937.

It is common to find that the attorney or his associates have, in pursuit of legal business, engaged in misleading or deceptive practices.

The attorney or his associates may make misrepresentations to the client or to his family designed to induce employment.*

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* See, e.g., Younger v. State Bar (1974) 12 Cal.3d 274, 113 Cal.Rptr. 829, 522 P.2d 5 (misrepresentation by attorney and his associates that they had witnessed accident and had had similar injuries; other representations apparently without foundation); Best v. State Bar (1962) 57 Cal.2d 633, 636-637, 21 Cal.Rptr. 589, 371 P.2d 325 (misrepresentation by attorney to criminal defendant's family that certain charges were pending against defendant; further misrepresentation by attorney that part of attorney's fees would be paid in bribes to government officials; misrepresentation of fee arrangement); Honoroff v. State Bar (1958) 50 Cal.2d 202, 206, 323 P.2d 1003 (misrepresentation that attorney had relative injured in same accident); Mitton v. State Bar (1958) 49 Cal. 2d 686, 688-689, 321 P.2d 13 (misrepresentation by attorney that he and his associate were eyewitnesses to accident; in another count, misrepresentation by attorney that he already represented party with related claim);

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Sometimes the attorney fails to disclose relevant information to the prospective client.*

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Tonini v. State Bar (1956) 46 Cal.2d 491, 495, 297 P.2d 1 (misrepresentation of attorney's name; Penaat v. State Bar (1944) 25 Cal.2d 26, 32-33, 152 P.2d 442 (various misleading representations to prospective clients); Roth v. State Bar (1937) 8 Cal.2d 656, 657-658, 67 P.2d 337 (misrepresentation by associate that he might be relative of prospective client); Sawyer v. State Bar (1934) 220 Cal. 702, 32 P.2d 369 (establishment of front organization by attorney); Recht v. State Bar (1933) 218 Cal. 352, 353, 23 P.2d 273 (misrepresentation by attorney to prospective clients that he had been investigating trust in which they were investors).

* See, e.g., Penaat v. State Bar (1944) 25 Cal.2d 26, 34-35, 152 P.2d 442 (attorney failed to disclose to clients that they were liable to attorneys of record as well as to attorney); Richardson v. State Bar (1942) 19 Cal.2d 707, 710, 122 P.2d 889 (attorney failed to disclose that he was administrator of estate at time he sought to represent heir to same estate); Recht v. State Bar (1933) 218 Cal.352, 353, 23 P.2d 273 (attorney failed to disclose relationship with investment trust at time he solicited employment from investors therein).

The attorney often puffs his own abilities.* He may even guarantee success.**

* See, e.g., Geffen v. State Bar (1975) 14 Cal.3d 843, 850, 122 Cal.Rptr. 865, 537 P.2d 1225 (representation by associate that attorney's law firm "specialized in automobile accidents"); Younger v. State Bar (1974) 12 Cal.3d 274, 281-282, 113 Cal.Rptr. 829, 522 P.2d 5 (attorney represented that he could get more money for client than any other attorney; in another count, attorney claimed that he and his partner had handled several of "these accident cases" and had "won them all"); Ewell v. State Bar (1934) 2 Cal.2d 209, 217, 40 P.2d 264 (attorney represented to client that he "specialized" in practice of criminal law, knew "ins and outs" of criminal practice and could more adequately represent criminal defendant than a "civil" lawyer; attorney claimed he had handled forty cases and had been successful in most of them); Fish v. State Bar (1931) 214 Cal. 215, 221, 4 P.2d 937 (attorney showed prospective client $5,000 check stating it represented settlement negotiated for another client).

** See, e.g., Geffen v. State Bar (1975) 14 Cal.3d 843, 848, 122 Cal.Rptr. 865, 537 P.2d 1225 (attorney's agent told prospective client she could make at least $1,000); Younger v. State Bar (1974) 12 Cal.3d 274, 281, 113 Cal.Rptr. 829, 522 P.2d 5 (attorney represented that he would guarantee client $20,000 and a brand new car and that client would not have to work a day in her life);

(footnote continued on next page)

The attorney or his associates will frequently depricate the abilities of other attorneys.*

(footnote continued from preceding page)

Best v. State Bar (1962) 57 Cal.2d 633, 636, 21 Cal.Rptr. 589, 371 P.2d 325 (attorney represented that his services would assure prospective client "would either be freed or would be placed under the Youth Authority for not more than 18 months as punishment").

* See, e.g., Geffen v. State Bar (1975) 14 Cal.3d 843, 851-852, 122 Cal.Rptr. 865, 537 P.2d 1225 (attorney's associate told client that he "knew all the good personal injury attorneys and that he had never heard of [client's attorney] and therefore thought he probably was not a very good attorney"); Younger v. State Bar (1974) 12 Cal.3d 274, 280-281, 113 Cal.Rptr. 829, 522 P.2d 5 (attorney and his associate stated attorney could do more for client than client's present attorney); Ewell v. State Bar (1934) 2 Cal. 2d 209, 210 and 217, 40 P.2d 264 (attorney told client that he was "certain to go to San Quentin if he allowed his present attorney to defend him"; attorney asserted that other attorney was hardly ever seen in criminal courts); Recht v. State Bar (1933) 218 Cal.352, 353, 23 P.2d 273 (attorney claimed that no other attorney could make recovery for clients).

Another harmful aspect of direct solicitation and ambulance chasing is the influence which such practices have on the quality of legal representation that solicited clients receive and the prices that they pay for legal services.

The attorney often becomes dependent on solicited (as opposed to client-generated) employment. In turn, the attorney becomes more dependent upon the associates who feed legal business to him. Frequently the associates become the employers, and the attorney "fronts" for their business efforts.* Often

* See, e.g., Dudney v. State Bar (1931) 214 Cal. 238, 4 P.2d 770; Dahl v. State Bar (1931) 213 Cal. 160, 1 P.2d 977; Irving v. State Bar (1931) 213 Cal. 81, 1 P.2d 2; Howe v. State Bar (1931) 212 Cal. 222, 298 P.25; Smallberg v. State Bar (1931) 212 Cal. 113, 297 P. 916; Shaw v. State Bar (1931) 212 Cal. 52, 297 P. 532; Smith v. State Bar (1930) 211 Cal. 249, 294 P. 1057; Townsend v. State Bar (1930) 210 Cal. 362, 291 P. 837.

the relationship results in inadequate representation of clients' interests.*

When the prospective client shuns the solicitations, the attorney may become vindictive.**

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* See, e.g., Howe v. State Bar (1931) 212 Cal. 222, 227, 298 P. 25 (attorney commenced and dismissed actions without authority from or consulting with clients); Smallberg v. State Bar (1931) 212 Cal. 113, 116, 297 P. 916 (attorney did not meet with clients until after learning that they were dissatisfied with his services and were contemplating a change of attorneys); Shaw v. State Bar (1931) 212 Cal. 52, 55, 297 P. 532 (attorney did not come into contact with clients until time of settlement and adjustment); Smith v. State Bar (1930) 211 Cal. 249, 252-255, 294 P. 1057 (attorney did not meet with clients until complaint had been filed; settlements were negotiated by adjuster); Townsend v. State Bar (1930) 210 Cal. 362, 369, 291 P. 837 (non-lawyer prepared complaints; attorney sometimes, but not always, saw clients, and took little interest in settlements of claims).

** See, e.g., Ewell v. State Bar (1934) 2 Cal.2d 209, 219-220, 40 P.2d 264 (attorney sought to have prospective client's probation revoked when he refused attorney's services and turned informer and witness

(footnote contined on next page)

Solicited employment relationships also often have unfortunate financial repercussions for clients.

The attorney who is willing to pressure the unwary into accepting his representation is often also willing to mulct exorbitant fees from them.* The attorney may split

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(footnote continued from preceding page)

against attorney); Smallberg v. State Bar (1931) 212 Cal. 113, 116, 297 P. 916 (attorney had court dismiss without prejudice two actions which he had filed when he learned that clients were seeking other counsel).

* See, e.g., Best v. State Bar (1962) 57 Cal.2d 633, 636-637, 21 Cal.Rptr. 589, 371 P.2d 325 ($3,000 fee charged for entry of guilty plea); Penaat v. State Bar (1944) 25 Cal.2d 26, 28, 152 P.2d 442 (attorney attempted to collect fees that were not owed him); Recht v. State Bar (1933) 218 Cal. 352, 353-354, 23 P.2d 273 (attorney collected one-third contingency fee of $500 from one client and $600 from another in action in which attorney knew that defendants were willing to make amends anyway).

legal fees with a non-lawyer.*

The attorney may also fail to make a proper accounting to the client for funds

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* See, e.g., Utz v. State Bar (1942) 21 Cal.2d 100, 108, 130 P.2d 277 (attorney split fees with heir hunter); Ring v. State Bar (1933) 218 Cal. 747, 750, 24 P.2d 821 (apparent fee-splitting with agent); Dahl v. State Bar (1931) 213 Cal. 160, 162, 1 P. 2d 977 (attorney split contingency fee with insurance adjuster); Irving v. State Bar (1931) 213 Cal. 81, 82-83, 1 P.2d 2 (insurance adjuster received percentage of settlement from which attorney was paid salary or percentage); Howe v. State Bar (1931) 212 Cal. 222, 225-226, 298 P. 25 (insurance adjuster received percentage of settlement from which attorney was paid fixed sum); Smallberg v. State Bar (1931) 212 Cal. 113, 115-116, 297 P. 916 (insurance adjuster received percentage of settlement from which attorney was paid fixed sum); Shaw v. State Bar (1931) 212 Cal. 52, 54-55, 297 P. 532 (insurance adjuster received percentage of settlement from which attorney was paid fixed sum); Smith v. State Bar (1930) 211 Cal. 249, 294 P. 1057 (insurance adjuster received percentage of settlement from which attorney was paid salary); Townsend v. State Bar (1930) 210 Cal. 362, 364, 291 P. 837 (insurance adjuster received percentage of settlement from which attorney was paid salary and fixed sum for each court appearance).

received.*

The foregoing practices, which are inherent in the solicitation of professional employment by attorneys, either directly themselves or indirectly through lay intermediaries such as ambulance chasers, are still matters of great public concern and give rise to public outrage when discovered. See, e.g., Reasons and Rosenzweig, To Mask Illegal Activities Ring Used Hospital Charity (March 19, 1974) Los Angeles Times, pp. 1-3; Reasons and Rosenzweig, Promises of Windfall Settlement, Ring Preyed on Accident Victims in Barrios (March 20, 1974) Los Angeles Times, p. 1; Reasons and Rosenzeig, Profitable Sideline, Ring Wrote Medical Reports to

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* See, e.g., Tonini v. State Bar (1956) 46 Cal.2d 491, 496, 297 P.2d 1 (attorney "on occasions" failed to make a proper accounting to his clients); Roth v. State Bar (1937) 8 Cal.2d 656, 658, 67 P.2d 337 (attorney did not pay client's share of settlement until disciplinary proceedings were commenced).

Back Claims (March 21, 1974) Los Angeles Times, Section II, p. 1; Reasons and Rosenzweig, Auto Accident Victims, Aliens Steered to Ring by Mexican Consulate (March 22, 1974) Los Angeles Times, Section II, p. 1.

D. The Ohralik Case Provides Yet Another Example of The Risks To Which The Public And The Administration of Justice Are Exposed When Attorneys Solicit Professional Employment For Their Own Purposes

Ohralik's actions in soliciting the personal injury claims of the two young girls in this case provide yet another example of the way in which members of the public are harmed when attorneys solicit professional employment for their own purposes.

The record clearly demonstrates that Ohralik took advantage of two young girls, with whom he was only slightly acquainted, at a time when they were extremely vulnerable. He bound them to retainer contracts from which they later extricated themselves

only with substantial effort and expense.

Ohralik's contacts occurred while each girl was recovering from serious bodily injuries and were unannounced, in person and out of the presence of parents or other adults.

He solicited Carol in her hospital room eleven days after the accident, while she lay in traction with two broken legs. Although she refused his requests that she sign a retainer agreement at that time, Ohralik nonetheless took photographs of her and assured her that he would take care of everything. Undaunted by Carol's refusal to retain him, Ohralik went to see Carol's parents. He induced them to show him their insurance policy and to discuss the accident in detail with him before he knew Carol had decided to retain him.

In soliciting Wanda, Ohralik literally employed classic "foot in the door"

salesmanship techniques, stepping inside the front door before stating his name and purpose. Wanda had been home from the hospital for less than three hours when Ohralik called on her. She could walk only with the assistance of crutches, and she was experiencing considerable pain.

He puffed his own abilities, claiming to the McClintocks that he was experienced in insurance matters and could take care of everything, and describing to Wanda in detail his success in a similar case.

The record also reflects several instances in which Ohralik misrepresented facts. For example, he told Wanda that the McClintocks had asked him to speak with Carol and had hired him as Carol's lawyer. These statements are patently false and are contradicted by Ohralik's own testimony. Ohralik may also have fabricated Carol's alleged request that he ask her parents to

visit her, as well as his assertion that he met with Carol's parents twice on the 13th of February.

In addition to making these affirmative misrepresentations, Ohralik, without the knowledge or consent of the people involved and at a time when there was no attorney-client relationship which would protect disclosures, tape recorded conversations with both the McClintocks and Wanda. When his clients later attempted to discharge him, Ohralik used these tapes against them by offering the tapes as evidence of his retainer agreements.

Because of Ohralik's eagerness to secure both girls as clients, he gave conflicting statements of their rights under the law. He told Wanda's mother, when she attempted to discharge him, that she could sue the McClintocks. He did not, however, mention to her the Ohio guest statute, on

which he had relied in assuring the McClintocks that Wanda's family could not successfully sue them. He also did not tell either girl that their interests could potentially conflict.

Both girls were required to retain counsel to terminate their relationships with Ohralik, and they sustained financial losses as a result. Wanda's settlement proceeds were delayed for several months while the dispute about Ohralik's fee was resolved, and four days after the disciplinary hearing, Ohralik sued Wanda for the amount he maintained was due him, despite his testimony that he would drop his claim. Carol ended up paying Ohralik the full one-third fee he demanded and, in addition, had to pay a second attorney $900 to complete the settlement process with the insurance company and to defend her in the fee action Ohralik

brought against her.

The facts revealed by the record in this case evidence Ohralik's invastions of privacy, high-pressure salesmanship, undue influence, overreaching, misleading and deceptive statements, divided loyalties, inadequate representation, breaches of fiduciary duties and vindictiveness. Such conduct is not only directly harmful to those who are subjected to it, it also impairs development of an attorney-client relationship and erodes the public's confidence in the system of administration of justice.

CONCLUSION

The dangers to the public presented by door-to-door solicitations for the sale of products and services are well documented. See, e.g., Breard v. City of Alexandria (1951) 341 U.S. 622, 71 S.Ct. 920; The Direct Selling Industry: An Empirical Study (1969) 16 U.C.L.A. L.Rev. 883; Federal Trade Commission, Cooling-Off Period for Door-to-Door Sales - Trade Regulations Rule and Statement of Basis and Purpose (1972) 37 Fed.Reg. 22933.

For example, the Federal Trade Commission summarized the problems associated with door-to-door sales as follows (37 Fed.Reg. 22937):

> "From the record in these proceedings, it is clear that the frequency and number of complaints arising out of door-to-door sales is substantial. Those involved in legal aid programs and consumer protection activities were particularly vociferous in their condemnation of the practices of some door-to-door sellers.
>
> "The complaints of consumers regarding door-to-door salesmen fall within five basic headings. These are: (1) Deception by salesmen in getting inside the door; (2) high pressure sales tactics; (3) misrepresentation as to the quality, price, or characteristics of the product; (4) high prices for low-quality merchandise; and (5) the nuisance created by the visit to the home by the uninvited salesmen."

But the dangers are even greater in the case of attorney solicitation because such solicitation also impairs formation of attorney-client relationships as well as the public's confidence in the system of administration of justice.

The establishment of a relationship of trust and confidence between client and attorney is fundamental to American jurisprudence and everywhere protected by the attorney-client privilege. But how can a client who at one moment may be skeptical of and resisting the salesmanship

tactics of an attorney suddenly, once the sale is closed and the client has signed on the dotted line of the attorney's written retainer agreement, create the relationship of complete trust and confidence that is necessary for the attorney to properly represent the client? Quite simply, the client can't shift mental gears that fast, or perhaps at all. Solicitation by attorneys for their own purposes makes establishment of proper attorney-client relationships unnecessarily difficult, if not impossible.

And the impact of this handicap goes far beyond the individual attorney-client relationship itself. It has often been observed that attorneys are officers of the court and vital to our system of administration of justice. When a client mistrusts his own attorney, it is easy for the client to mistrust the entire system.

The fact that the public becomes outraged by the abuses inherent in the solicitation process is not speculative; it has been demonstrated over the years and as recently as 1974 by the California experience (see, supra, pp. 53-70). There can be no doubt that the public's confidence in the system of administration of justice is impaired when attorneys engage in practices such as those revealed by the California experience and the record in the Ohralik case.

These then are the public interests served by the prohibition against attorneys soliciting professional employment for their own purposes: prevention of impairment of attorney-client relationships and the public's confidence in the system of administration of justice, as well as exposure of the public to situations which, by their very nature, involve risks of invasions of

privacy, high-pressure salesmanship, undue influence, overreaching, misleading and deceptive practices, divided loyalties, inadequate representation and other breaches of fiduciary duties.

Whatever First Amendment right the public may have to receive information from attorneys is not well served by allowing it to be conveyed as part of an in-person (and often in-home or in-hospital) sales pitch. Indeed, solicitation may well distort or decrease the public's information, rather than enhance it. The victim of solicitation often has no real opportunity to question the attorney's statements, or to compare the services being offered with others that may be available, or to reflect upon the final decision.

Whatever First Amendment right the attorney might conceivably have to convey

information to potential clients by in-person solicitation is considerably weakened by the fact that the attorney now has an alternative means available for conveying such information: advertising.
See Bates v. State Bar of Arizona (1977) ___ U.S. ___, 97 S.Ct. 2691.

To advertise availability in the newspapers so as to help interested persons locate appropriate attorneys for perceived legal problems is one thing; the reader can prepare and choose whether or not to initiate contact and, if so, with whom.

But it is a wholly different thing to allow attorneys to focus all of their oral advocacy skills upon persons, often in home or hospital, so as to at once create or heighten an apparent need for legal representation and at the same time sell that particular attorney's services to meet the

need. The person in such a situation is often emotionally distraught, has neither prepared for nor initiated the contact, and may have great difficulty in terminating the contact without agreeing to retain the attorney.

The California Bar respectfully submits that when the First Amendment interests involved in the Ohralik case are properly assessed, they are far outweighed by the public interests served by the prohibition.

Solicitation by attorneys for their own purposes, either directly themselves or indirectly through lay intermediaries such as ambulance chasers, inherently does not flow "freely and cleanly." Bates v. State Bar of Arizona (1977) ___ U.S. ___, 97 S.Ct. 2691, 2709.

For the reasons stated in this brief, the California Bar respectfully urges this Court to preserve the protections afforded citizens and the system of administration of justice by the prohibition against attorneys soliciting professional employment for their own purposes.

Dated: December 20, 1977.

Respectfully submitted,

Herbert M. Rosenthal
Stuart A. Forsyth

Attorneys for Amicus Curiae
The State Bar of California

APPENDIX

Ohralik v. The Ohio State Bar Association
(U.S.Sup.Ct. Docket No. 76-1650)

THE FACTS, ACCORDING TO:

APPENDIX A

Supreme Court of Ohio
Source: 48 Ohio St.2d 217

Albert Ohralik was admitted to the practice of law in Ohio in March 1948. He is 55 years old and resides in Montville, Ohio. His law office is in Cleveland. [p. 217]

Both Carol and Wanda were, if anything, casual acquaintances. Neither were relatives or former clients. [p. 217]

Counsel for Appellee
(Ohio Disciplinary Agency)
Source: Motion to Dismiss

[Note: Counsel set out in the motion the entire Ohio Supreme Court opinion. Included here are only the additional factual statements made in the motion.]

Counsel for Appellant
(Attorney Ohralik)
Source: Brief for Appellant

For many years preceding the events of 1974, appellant had been a prominent and esteemed attorney in a small township known as Montville, Ohio, maintaining a law practice both there and in Cleveland. App. 69a. He had an "attorney at law" placard in front of his Montville house, and had been active politically in the community. App. 62a, 72a. The findings of fact below (J.S. App. 1a-2a, 12a), while reflecting Carol McClintock's testimony (App. 36a) that she had not known appellant was a lawyer until he visited her in the hospital on February 13, acknowledged but did not resolve appellant's contrary testimony "that Carol must have been aware that he was a practicing lawyer because, among other things, he had been a candidate for public office and the fact was evident from his campaign literature" (J.S.App. 2a), and he "had displayed political campaign posters in his yard situated a mere mile from Carol's home" (J.S.App. 12a). [p. 9]

Moreover, since 1968, appellant had maintained a mailbox in the Montville postoffice, which he often visited twice a day to pick up his mail. On those visits, while waiting for the mail to be distributed, he frequently saw and talked to Carol McClintock - perhaps two or three times a week. App. 50a. Carol acknowledged that she had met appellant on these many occasions at the postoffice. App. 36a-38a. And the findings

Counsel for Other Amici
(Public Citizen and
National Resource Center
for Consumers of Legal Services
(Source: Motion and Brief
of Amici Curiae)

Appellant was slightly acquainted with Carol. [p. 5]

Supreme Court of Ohio
Source: 48 Ohio St.2d 217

In the early morning of February 13, 1974, while at the Montville, Ohio, Post Office, appellant learned from the postmaster's brother that Carol and Wanda had been involved in a serious automobile accident. [p. 217]

Appellant telephoned Carol's mother, obtained her consent to visit Carol at the hospital, and, later that day, proceeded to the hospital where Carol was undergoing treatment f - the injuries sustained in the accident. [p. 217]

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Counsel for Appellee
(Ohio Disciplinary Agency)
Source: Motion to Dismiss

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Counsel for Appellant
(Attorney Ohralik)
Source: Brief for Appellant

below stated that she "admitted to a casual acquaintanceship with him, which began with her visits to the Montville Post Office to pi k up the family mail, and which was limited to a customary exchange of greetings on such occasions." J.S.App. 1a-2a. He had first met Carol in this fashion about four or five years prior to her 1974 accident. App. 50a. Appellant further testified that he also had met and become acquainted with Wanda Lou Holbert at these local postoffice gatherings, though he "didn't see her nearly as much" as he had seen Carol McClintock. App. 68a. [pp. 9-10]

Appellant first learned of the accident from the postmaster's brother on the 4th or 5th of February. [p. 11]

He telephoned the McClintocks, and then went to visit them. They were worried about whether Wanda's family would sue them, and appellant allayed their fears by explaining the significance of the Ohio guest statute. [pp. 14-15]

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Counsel for Other Amici
(Public Citizen and
National Resource Center
for Consumers of Legal Services
(Source: Motion and Brief
of Amici Curiae)

Appellant heard about the accident from the postmaster's brother when he made one of his bi-weekly trips to the post office to pick up his mail. [Tr. 177-80]. [p. 6]

Shortly after hearing about the accident he called Carol's parents. He went to see them, and then went to see Carol in the hospital. [pp. 5-6]

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Supreme Court of Ohio
Source: 48 Ohio St.2d 217

After reviewing with Carol the legal merits of her cause and the need for proper representation, appellant obtained Carol's consent to handle the claim. [p. 218]

Counsel for Appellee
(Ohio Disciplinary Agency)
Source: Motion to Dismiss

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Counsel for Appellant
(Attorney Ohralik)
Source: Brief for Appellant

From the McClintocks' house, appellant drove directly to the hospital in Painesville to visit Carol, without his tape recorder. He commiserated with her on her discomfort. She brought up in the conversation that some hospital administrator was urging a lawyer upon her, and appellant said, "Yes, this certainly is a case that would entice a lawyer. That would interest him a great deal" (App. 53a). Carol's version of this visit was that appellant came into the hospital, told her that he was a lawyer and that he had talked to her mom and dad. She had been expecting him because her parents had called to tell her he was coming. She added that appellant "said that my bed was by a window overlooking the emergency entrance to the hospital when the ambulances came in, and that he had cards with him, and he said that I could chase ambulances for him, and he gave me some cards" (App. 31a). [p. 16]

The precise manner in which the subject of appellant being retained to represent Carol arose during this hospital room visit is not revealed by the record. But the subject did arise. [p. 16]

Carol asked him to tell her parents to call on her to discuss the matter further, indicating that she wanted to talk to her parents first. [p. 16]

Counsel for Other Amici
(Public Citizen and
National Resource Center
for Consumers of Legal Services
(Source: Motion and Brief
of Amici Curiae)

During his visit with Carol appellant advised her of her legal rights and they discussed the possibility of his retention on a one-third contingent fee basis. He then returned to the McClintock's home and was told that Carol had called to request him to represent her. Mr. Ohralik consented and began to discuss the accident with the McClintocks. [Tr. 180-90]. [p. 6]

Supreme Court of Ohio
Source: 48 Ohio St.2d 217

After leaving the hospital, appellant drove to the home of Carol's parents, where he examined their automobile liability policy, discussed the law applicable to passenger guests, and obtained the address and directions to the home of Wanda Lou Holbert, a passenger in the automobile driven by Carol McClintock. [p. 218]

Wanda Lou was then 18 years of age. Appellant, upon being admitted to her home, advised Wanda that he represented Carol McClintock, and that he had a "tip" for her, namely: that she had a substantial legal claim for the injuries she had suffered while riding as a passenger in the automobile driven by her neighborhood friend, Carol. He further informed her he was prepared to supply her with the legal services necessary to capitalize on her claim. Respondent's representations induced Wanda to orally agree to engage him as her attorney in the matter. [p. 218]

Counsel for Appellee
(Ohio Disciplinary Agency)
Source: Motion to Dismiss

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Appellant secretly tape recorded his conversation with Wanda Lou Holbert by hiding his tape recorder under his coat. [p. 8]

Counsel for Appellant
(Attorney Ohralik)
Source: Brief for Appellant

Acting in part to convey Carol's request to her parents, the appellant, upon leaving the hospital, drove to the home of Carol's parents, where he examined their automobile liability policy, discussed the law applicable to passenger guests, and obtained the address and directions to the home of Wanda Lou Holbert, a passenger in the automobile driven by Carol McClintock. [p. 17]

Following his conversation with the McClintocks, appellant went to the home of Wanda Lou Holbert, who had recently returned from a hospital confinement. He received directions as to how to reach her home from the McClintocks. App. 95a. He went to the Holbert home for the purpose of interviewing her as "a witness to the cause of the accident and the circumstances surrounding the accident . . . [and not] for the purpose of soliciting her as a client." App. 58a. And in order to preserve whatever evidence she might be able to provide, appellant tape recorded his conversation with Wanda Lou. The transcription of that taped

Counsel for Other Amici
(Public Citizen and
National Resource Center
for Consumers of Legal Services
(Source: Motion and Brief
of Amici Curiae)

During his discussion with the McClintocks appellant assured them that they did not need to worry about being sued by Carol's passenger because Ohio had a guest statute which prohibited such suits. He also explained the operation and underlying theory of the guest statute, and explained other theories of liability that could supercede it, but advised the McClintocks that in their case they had little to fear. In addition, appellant explained the uninsured motorist coverage of the McClintocks' policy and informed them that Carol could be compensated for injuries even though the driver who caused the accident had no liability insurance. He also explained how the negotiation and the settlement process generally worked in personal injury cases. [Tr. 167, 182, 234, and 96a-105a]. [p. 6]

Mr. Ohralik next went to visit Wanda Lou Holbert, the passenger in Carol's car who had also been injured in the accident. Wanda had just returned home after being released from the hospital, and appellant stated that he was calling on her as a witness to the accident. Shortly after their conversation began, however, appellant volunteered that he was already representing Carol and offered to represent Wanda as well on a one-third contingent fee basis. Wanda said, "O.K.," and they then discussed the circumstances surrounding the accident. During this discussion, appellant explained the

Supreme Court of Ohio
Source: 48 Ohio St.2d 217

Appellant, in support of his claim that a binding agreement to engage his services had been made with Wanda Lou, introduced in evidence a tape recording of the February 13, 1974, conversation with Wanda Lou. The recording was made on appellant's recorder, hidden at the time of recording under appellant's coat, and made without the knowledge of Wanda Lou. Some of the recorded conversation indicates a consent by Wanda Lou to the utilization of respondent's professional services, but the conversation also demonstrates that this consent was induced and solicited by Appellant. [pp. 218-219]

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The following day, February 14, 1974, appellant telephoned Wanda Lou for purposes of firming the client-attorney relationship begun the preceding day. The phone was answered by Wanda Lou's mother, who unceremoniously advised him that his services were not desired. Appellant retorted by pointing out that it was not she but Wanda Lou, a competent consenting adult, who was his client. [p. 218]

Counsel for Appellee
(Ohio Disciplinary Agency)
Source: Motion to Dismiss

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Counsel for Appellant
(Attorney Ohralik)
Source: Brief for Appellant

conversation appears at App. 118a-130a. [p. 19]

On February 15, a written agreement was signed by Carol in her hospital room, following a further discussion of the matter with appellant. App. 61a. [p. 19]

The following morning, February 14, Wanda's mother attempted to repudiate the oral agreement. When the appellant called the Holbert home to talk further with Wanda, her mother answered the phone and informed appellant that "We talked it over and we don't want to sue nobody, and we don't want you as a lawyer." App. 24a. Appellant reportedly replied: "Well, Wanda is eighteen. She is her own boss and she can talk for herself . . . . [and when] Wanda gets to feeling better, I would like for her to call me back."

Counsel for Other Amici
(Public Citizen and
National Resource Center
for Consumers of Legal Services
(Source: Motion and Brief
of Amici Curiae)

nature of the claims that Wanda had against the McClintocks' insurance company, he explained her obligations under their contingent-fee arrangement, and he cautioned her against speaking to insurance adjusters, frequently emphasizing that she was now represented by a lawyer. [118a-130a]. [pp. 6-7]

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The following day, February 14, 1974, appellant received a telephone call from Wanda's mother, during which she attempted to discharge him. Appellant, however, asserted that he was representing Wanda, an 18 year old, legally competent adult, and that Wanda's mother could not effectively discharge him. After this conversation appellant took no action to confirm his retention by Wanda but rather continued to assert claims on her behalf against the insurance company. Similarly, Wanda took no action to confirm her

Supreme Court of Ohio
Source: 48 Ohio St.2d 217

Counsel for Appellee
(Ohio Disciplinary Agency)
Source: Motion to Dismiss

Thereafter, both Carol and Wanda attempted to disengage appellant's services. Wanda's attempt began immediately, and Carol's some time after February 1974. Appellant insisted that he had a valid binding agreement with both, which he was determined would be performed. Appellant sued Carol McClintock on her signed agreement for the value of services rendered, and ultimately accepted a settlement in the amount of $4,166.66. [p. 219]

Counsel for Appellant
(Attorney Ohralik)
Source: Brief for Appellant

App. 24a. Later, on March 14, Wanda herself wrote a letter to appellant, stating:

> I do not wish to sue anyone so, would you please contact anyone that you informed and tell them you are not my attorney, that is if you have told anyone. Thank you.

Prior to the receipt of this letter, appellant had made certain insurance demands on Wanda's behalf, but he never received or consummated any settlement offer for her. [pp. 21-22]

By April 11, appellant had sent the insurance carrier a demand that Carol be paid the maximum $12,500; and shortly thereafter, appellant received an acknowledgement from the carrier that her claim was indeed worth $12,500 and that this amount would be paid upon execution of the proper releases. Such releases were never executed, for on April 12, 1974, appellant received a communication from Carol discharging him as her attorney and demanding that he transfer his files to another attorney; she, as well as her new counsel, asserted that appellant's services were worthy of no compensation and that the requested releases would not be executed. [p. 22]

As the findings below state (J.S.App. 3a, 14a), appellant insisted that he had valid binding agreements with both Carol and Wanda, which he demanded be performed. He in fact sued Carol

Counsel for Other Amici
(Public Citizen and
National Resource Center
for Consumers of Legal Services
(Source: Motion and Brief
of Amici Curiae)

mother's attempted discharge. It was not until one month later, on March 14, 1974, that Wanda finally wrote a one sentence letter to appellant discharging him, apparently because of her feeling that there had been undue delay in her receipt of benefits from the insurance company. [Tr. 32, 63-65]. In addition, Wanda filed a grievance complaint against Mr. Ohralik. [p. 7]

In the meantime, Carol had also become dissatisfied with Mr. Ohralik's representation and wished to replace him with another attorney. She too stated that this was because of delay in receiving any payments from the insurance company, and because of what she stated was insensitivity and neglectful representation on the part of appellant. [Tr. 97-99, 118, 197]. In Carol's case, however, appellant eventually obtained an agreement from the insurance company to pay her $12,500, the maximum amount available under the policy, but Carol refused to accept the money and refused to pay appellant the $4,166.66 he claimed as a contingent fee. Appellant then sued Carol to collect his fee, and Carol hired a second attorney to defend that suit. Ultimately, the suit was settled, and Carol paid

Supreme Court of Ohio
Source: 48 Ohio St.2d 217

Relator, Ohio State Bar Association, filed a complaint with the Board of Commissioners on Grievances and Discipline against Albert Ohralik, alleging that he solicited the personal injury cases of Carol McClintock and Wanda Lou Holbert in violation of DR 2-103(A) and DR 2-104(A) of the Code of Professional Responsibility. [p. 217]

After hearings on November 24, 1975, and January 29, 1976, the Board found that the appellant did, in fact, solicit the personal injury cases of Carol McClintock, and Wanda Lou Holbert, in violation of DR-2-103(A) and DR 2-104(A), Code of Professional Responsibility.

The Board found appellant's defense, that the solicitation of business by an attorney is protected by the First and Fourteenth Amendments to the United States Constitution, to be without merit and overruled his motion to dismiss. [p. 219]

Counsel for Appellee
(Ohio Disciplinary Agency)
Source: Motion to Dismiss

Yet, four days after Appellant testified he would abandon his claim against Wanda, he sued Wanda Lou Holbert in the Chardon Municipal Court, Geauga County, Ohio, for $2,466.66, claiming a contract of employment. [p. 9]

Counsel for Appellant
(Attorney Ohralik)
Source: Brief for Appellant

on her signed agreement for the value of services rendered, and ultimately accepted a settlement in the amount of $4,166.66. [p. 22]

After a hearing before the Board of Commissioners, the Board concluded that the evidence "fully demonstrates" that appellant, in seeking and obtaining agreements from Wanda and Carol to represent them in their respective claims for damages arising from the February 2 accident, "violated Disciplinary Rule 2-103A and 2-104A of the Code of Professional Responsibility." The Board accordingly recommended that appellant "be given a public reprimand."

On review, the Supreme Court of Ohio without explanation escalated the sanction from a public reprimand to an indefinite suspension from the practice of law. And it added the comment that a "review of the record before us reflects ample, uncontraverted evidence supportive of the finding of the Board of Commissioners. . .that respondent, Albert Ohralik, violated DR 2-103(A) and DR 2-104(A)." The court made no identification of the so-called "uncontroverted" evidence, much of which had been fully controverted by the appellant's

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appellant the full fee that he had demanded. She also paid her second attorney a $900 fee. [Tr. 118-19, 133-34, 138, 140-41]. [pp. 7-8]

The complaints made by Wanda and Carol prompted the Ohio State Bar Association to request the initiation of formal grievance proceedings against appellant charging him with violating the two prohibitions on solicitation contained in DR 2-103(A) and DR 2-104(A). [p. 8]

After conducting an evidentiary hearing, a three-member Panel of the Board of Commissioners on Grievances and Discipline found that appellant had unethically solicited Wanda and Carol in violation of those two code provisions, and recommended that he be given a public reprimand. Appellant had argued that the two ethical provisions under which he was charged were invalid because they unconstitutionally deprived him of his First Amendment right of Free Speech, but the Panel rejected this argument, devoting only a single sentence to it. [p. 8]

On appeal, the Ohio Supreme Court upheld the Panel's ruling but, without explanation, increased appellant's punishment to indefinite suspension from practice and taxed $1797.28 in costs against him. The Ohio Supreme Court also summarily rejected appellant's First Amendment claim, again disposing of it in a single

Supreme Court of Ohio
Source: 48 Ohio St.2d 217

A review of the record reflects ample, uncontroverted evidence supportive of the finding of the Board of Commissioners on Grievances and Discipline that appellant, Albert Ohralik, violated DR 2-103(A) and DR 2-104(A), in soliciting and obtaining agreements from Carol McClintock and Wanda Lou Holbert to represent each of them in their respective claims for damages arising out of the accident of February 2, 1974. [p. 220]

Appellant is hereby indefinitely suspended from the practice of law for these unethical violations of the Code of Professional Responsibility. [p. 220]

Counsel for Appellee
(Ohio Disciplinary Agency)
Source: Motion to Dismiss

Counsel for Appellant
(Attorney Ohralik)
Source: Brief for Appellant

testimony and by the taped conversations. And the court made no effort to distinguish as between DR 2-103(A) violations and DR 2-104(A) violations. The court did reiterate, of course, its ruling that appellant's solicitation of business was not "protected by the First and Fourteenth Amendments to the United States Constitution." [pp. 23-24]

Counsel for Other Amici
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sentence. The present appeal to this Court followed. [p. 8]

CITATIONS TO REPORTED DECISIONS
OF THE CALIFORNIA SUPREME COURT
IMPOSING DISCIPLINE ON ATTORNEYS
FOR DIRECT SOLICITATION AND
AMBULANCE CHASING
(Listed Chronologically)

Townsend v. State Bar
(1930) 210 Cal. 362, 291 P. 837

Smith v. State Bar
(1930) 211 Cal. 249, 294 P. 1057

Shaw v. State Bar
(1931) 212 Cal. 52, 297 P. 532

Smallberg v. State Bar
(1931) 212 Cal. 113, 297 P. 916

Howe v. State Bar
(1931) 212 Cal. 222, 298 P. 25

Irving v. State Bar
(1931) 213 Cal. 81, 1 P.2d 2

Dahl v. State Bar
(1931) 213 Cal. 160, 1 P.2d 977

Fish v. State Bar
(1931) 214 Cal. 215, 4 P.2d 937

Dudney v. State Bar
(1931) 214 Cal. 238, 4 P.2d 770

Recht v. State Bar
(1933) 218 Cal. 352, 23 P.2d 273

Remington v. State Bar
(1933) 218 Cal. 446, 23 P. 2d 510

Ring v. State Bar
(1933) 218 Cal. 747, 24 P.2d 821

Sawyer v. State Bar
(1934) 220 Cal. 702, 32 P.2d 369

Ewell v. State Bar
(1934) 2 Cal.2d 209, 40 P.2d 264

McCue v. State Bar
(1935) 4 Cal.2d 79, 47 P.2d 268

Roth v. State Bar
(1937) 8 Cal.2d 656, 67 P.2d 337

Waterman v. State Bar
(1939) 14 Cal.2d 224, 93 P.2d 95

Richardson v. State Bar
(1942) 19 Cal.2d 707, 122 P.2d 889

Utz v. State Bar
(1942) 21 Cal.2d 100, 130 P.2d 277

McGregor v. State Bar
(1944) 24 Cal.2d 283, 148 P.2d 865

Penaat v. State Bar
(1944) 25 Cal.2d 26, 152 P.2d 442

Griffith v. State Bar
(1953) 40 Cal.2d 470, 254 P.2d 22

Higgins v. State Bar
(1956) 46 Cal.2d 241, 293 P.2d 241

Tonini v. State Bar
(1956) 46 Cal.2d 491, 297 P.2d 1

Mitton v. State Bar
(1958) 49 Cal.2d 686, 321 P.2d 13

Honoroff v. State Bar
(1958) 50 Cal.2d 202, 323 P.2d 1003

Best v. State Bar
(1962) 57 Cal.2d 633, 21 Cal.Rptr. 589,
371 P.2d 325

Linnick v. State Bar
(1964) 62 Cal.2d 17, 41 Cal.Rptr. 1,
396 P.2d 33

Younger v. State Bar
(1974) 12 Cal.3d 274, 113 Cal.Rptr. 829,
522 P.2d 5

Geffen v. State Bar
(1975) 14 Cal.3d 843, 122 Cal.Rptr. 865,
537 P.2d 1225

Goldman v. State Bar
(1977) 20 Cal.3d 130, 141 Cal.Rptr. 447,
570 P.2d 463

see

77

56